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Authority EG 12958

By AR NARA Date 10/27

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PA/HO Department of State  
E.O. 12958, as amended  
July 12, 2005



DEPARTMENT OF STATE

Washington, D.C. 20520

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MEMORANDUM ON IMPLEMENTATION OF U.S.  
OCEANS POLICY AND PROGRESS OF LAW OF  
THE SEA NEGOTIATIONS

Prepared by John R. Stevenson, Chairman  
Inter-Agency Law of the Sea Task Force

This memorandum reports on measures taken in implementation of NSDM-122 at the 1971 July/August session of the expanded Seabeds Committee, acting as preparatory committee for the 1973 Law of the Sea Conference, and on the progress in our Law of the Sea negotiations.

I. Implementation of NSDM-122

A. Territorial Sea and Straits

On August 3rd, in Geneva, the U.S. Delegation introduced draft Articles I and II on a 12-mile territorial sea and on free transit through and over all straits used for international navigation. The introduction of the Articles (which were in the form previously discussed bilaterally with a number of countries) was pursuant to paragraph 1 of NSDM-122. The two Articles were presented as basic elements of the oceans policy announced by the President last year and the U.S. Representative, State Department Legal Adviser Stevenson, stated that the United States "would be unable to conceive of a successful Law of the Sea Conference that did not accommodate the objectives of these Articles."

In explaining these proposals, the U.S. stressed the importance to all states of facilitating navigation and the dependence of security interests on free transit through and over straits. We stated that the real concerns of those states making jurisdictional claims broader than 12 miles for resource purposes could be accommodated in a manner that protected freedom of navigation and overflight.

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### B. Seabeds

At the July/August session, the U.S. continued to press for the basic proposals contained in the draft seabeds convention submitted as a working paper the prior year.

In the course of the general debate it became apparent that the following two misconceptions regarding the United States proposals had led a number of delegations to oppose the trusteeship approach as reflected in the draft convention: first, an identification of this concept with the particular limits the U.S. had proposed for the outer boundary of the trusteeship area and, secondly, a failure to recognize the adaptability of this concept to achieve a number of different balances between coastal and international interests.

In order to maintain the viability of the trusteeship concept as an alternative to an exclusive resource zone, the U.S. Representative indicated that the United States was not committed to the geological method of delineating the outer boundary of the trusteeship zone suggested in the draft treaty and that the U.S. would consider other methods including a mileage method or combination of methods in determining the outer boundary. In addition, the U.S. Delegation stressed that the efficacy and applicability of the trusteeship concept did not depend upon particular limits, but was a flexible means of reaching equitable accommodations within several possible sets of limits, provided substantially all marine resources were not placed within an area of exclusive coastal State jurisdiction.

The Delegation stressed throughout the debate that the particular mixture of coastal and international rights proposed in the U.S. draft convention was not required by our trusteeship concept. There was, rather, a core of principles which we regarded as essential which would distinguish a meaningful trusteeship approach from a zone of exclusive coastal State jurisdiction. These included certain international standards, impartial third party dispute settlement, protection of other uses of the marine environment and provision for some sharing of benefits. However, the particular mixture of coastal and international rights and duties was clearly negotiable. The threat to freedom of navigation and other uses of the sea represented by an exclusive coastal State economic jurisdiction beyond 12 miles was emphasized.

### C. Fisheries

The U.S. also introduced on August 3rd, a draft Article III on fisheries, modified in accordance with fisheries option 1

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in NSSM-125, and with other nonsubstantive changes approved by the Delegation. The U.S. Representative stated that the text was a revision of that circulated to many governments and reflected many of the comments we had received. Our consultations had indicated a need for further accommodation of coastal states interests by distant-water states.

The U.S. welcomed discussion and negotiation on all aspects of the fisheries problem, particularly in connection with the traditional fishing rights of distant-water fishing states. In the U.S. view, negotiations between coastal and distant-water fishing states were especially suitable for arriving at an appropriate treaty text on traditional fishing rights. Fisheries proposals by other states would be welcomed, and sympathetic consideration would be given to any proposal which precluded the potential for encroachment on freedom of navigation and overflight beyond a 12-mile territorial sea.

The relationship between a solution to resource problems and freedom of navigation and overflight was stressed. Particular emphasis was placed on accommodation of coastal state fishing interests, in the area beyond 12 miles, by a mixed coastal-international regime with certain delegated authority to the coastal state but subject to international standards and dispute settlement.

The formal statements of the U.S. Delegation are annexed hereto.

## II. Progress of Law of the Sea Negotiations

### A. Status of U.S. Proposals

#### (1) Territorial Sea

Broad support was expressed for a 12-mile territorial sea. However, acceptance of this limit was conditioned by most developing countries on obtaining exclusive coastal state jurisdiction over living and non-living resources in a broad zone beyond 12 miles.

While most states, including all the major maritime powers, supported the principle of freedom of navigation beyond 12 miles, Brazil (publicly supported by Spain, Peru and Ecuador) did not. Brazil stressed the need for coastal state control over navigation of super-tankers and warships beyond 12 miles.

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Uruguay also demonstrated a degree of support for the Brazilian position, but, along with Peru and Ecuador, privately indicated a willingness to recognize free navigation beyond 12 miles.

(2) Straits

The U.S. proposal for free transit through and over international straits received only limited public support (Australia and the U.K. and, in some respects, Ethiopia and Singapore) and considerable public opposition. Some states (e.g., Denmark, Greece and Italy) acknowledged the importance of free transit but cited special circumstances which should exempt their own straits from the general rule. Italy and Denmark suggested that straits less than six miles wide, which are presently generally acknowledged to be completely overlapped by territorial seas and subject only to "innocent passage", should not be subject to the Article II free transit provisions since they are unaffected by the movement from a three mile to twelve mile territorial sea.

In general, states which did not support free transit either took the position that "innocent passage", as understood under international law, was adequate, or that the term "innocent" could be suitably redefined. Some States sought more objective definitional criteria of "innocent passage", e.g., over nuclear powered or armed vessels and control was sometimes phrased in terms of the potential pollution hazards posed by mammoth oil tankers or nuclear vessels. Also, certain island states, such as Indonesia, espoused the 'archipelago theory' of describing territorial waters by baselines drawn around the outer islands of the state, consequently closing the straits between the islands.

Spain was certainly the most adamant advocate of greater coastal state control and was particularly active behind the scenes to exclude any possibility of overflight from the straits discussion. Several Delegations indicated privately that there was stronger opposition to freedom of overflight than to freedom of transit, even including submerged transit by submarines. The Arab states were particularly concerned with the applicability of the free transit principle to the Straits of Tiran and Gulf of Aqaba. Non-straits states opposing our straits proposal appeared to be doing so principally to strengthen their bargaining position.

Although the majority of states which spoke publicly expressed reservations or opposition to the concept of free transit, there is a possibility from publicly expressed reservations or private discussions, that accommodation with

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Denmark, Indonesia, Italy, Greece and the Philippines can be found if their special interests are satisfied. Some developing countries are aware of the importance attached to free transit by the U.S. and have privately indicated a willingness to go along with the U.S. straits article if their economic demands are fulfilled.

Private discussions indicated that several states, including some with whom we have defense commitments such as Japan, and important straits states such as Malaysia, are not convinced of the importance of a right of free transit to their overall security interests. We have explained how such a right bears upon our overall defense effort, but Delegates here have seemingly not been persuaded.

The Soviets apparently have not decided upon the priority between their navigational interest regarding straits and their interest in distant-water fisheries. In discussions on straits, they have expressed the desire to limit the number of straits to be subject to any new regime by defining or specifying those used for international navigation. They have stated that negotiations will have to determine whether straits leading to enclosed or semi-enclosed seas (such as the straits of Tiran) are "straits used for international navigation." They also say that they desire a right of overflight.

(3) Seabeds

(a) Trusteeship Zone

The U.K. specifically endorsed "trusteeship", and several land-locked and shelf-locked countries expressed support for an intermediate zone approach. Canada proposed the idea of a "custodianship" under which the coastal state would exercise powers delegated by the international community in a zone adjacent to the coastal state with coastal state authority to enforce agreed international standards. Australia, Italy, Japan, the Soviet Bloc and a few other countries indicated that some sort of an intermediate zone approach could be given further consideration.

Most coastal developing countries, which expressed an opinion, opposed the trusteeship concept. However, a number of states, particularly Mexico, Colombia, Venezuela and Chile, stated in private discussions that they would consider including certain international elements in a coastal state resource zone but that they did not want a full trusteeship created.

(b) Exclusive Economic Zone

Many countries stated a strong preference for a 200-mile exclusive resource (living and mineral) zone. Perhaps

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as many as 30 states indicated publicly or privately, that they favored, were inclined toward, or could support, a 200-mile exclusive resource zone. Nevertheless, approximately half of the delegates did not take a specific stand on precise limits to such a zone, though many did mention a preference for "uniform distance", or "depth and distance", criteria for determining the seabed boundary.

(c) International Machinery

Broad agreement existed on the need for some kind of international machinery. Many proposals called for the creation of an assembly, council and secretariat. There was considerable disagreement over the composition of the council and whether or not a veto, consensus, weighted, or equality system of voting should be included. Of particular note was the strong expression of support among LDC's for a "one nation - one vote" system within the governing structure. Although most proposals made by the LDC's called for a council of manageable size, they made it clear that they are opposed to developed country control of this organ. The developed countries strongly supported weighted voting in the governing body. The Soviet Union proposed a bloc-consensus system.

The LDC's also supported establishment of an international agency which would have the power (exclusive in the case of some proposals) to engage directly in exploitation of the seabed, either by itself or through joint ventures or profit-sharing contracts. Both the Latin American draft and the land-locked/shelf-locked paper envisioned such activity. India and several African states also favored such a development. France, supported by the U.S. and U.K., spoke out forcefully against this idea and in favor of a licensing system. The Soviet Bloc opposed the concept of an operating agency as well.

(d) Economic Implications

The question of the possible impact from exploitation of seabed minerals on the economies of developing exporting countries received considerable attention. The U.N. SYG Report on the subject indicated that there probably would not be reason for concern, but this conclusion was challenged by a number of states, led by the Latin American and certain Persian Gulf states, who emphasized the sections of a preliminary report prepared by UNCTAD indicating there was a basis for concern. The U.S. presented a predominately factual statement on this question which, while well received, did not allay the fears of some states regarding the economic implications of deep seabed exploitation and did not suit the political objectives of the Latin Americans.

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(e) Benefit Sharing

The question of benefit sharing was not discussed in detail at this session. The U.K. did propose the creation of a Distribution Agency and several States suggested that "reserve areas" be set aside for development by the international community. A significant number of LDC's stressed the need for direct participation through training of LDC nationals and the sharing of technology and indicated that monetary benefits alone were insufficient.

(4) Fisheries

Discussion of fisheries jurisdiction revolved around extreme positions of (1) exclusive coastal state fishing rights over a broad zone, often expressed as a 200-mile exclusive resource jurisdiction, and (2) freedom of fishing on the high seas and the continuation of existing international and regional fisheries commissions.

Exclusive coastal State jurisdiction took the form of either zones of economic jurisdiction governing mineral and living resources or exclusive fisheries zones. The Latin American states presently claiming 200 miles and some African States (e.g., Kenya, Mauritania, Gabon and Algeria) stressed the necessity of coastal State exclusive economic jurisdiction within a zone of 200 miles. Several other States, including some developed States such as Australia and France, were thinking affirmatively about a 200-mile exclusive resource zone. Other States, such as Mexico, Venezuela, India and Tanzania, indicated a willingness to support such a zone but also were disposed toward the inclusion of international elements. The dominant theme expressed by the developing countries was the idea that the developing coastal States needed a zone of jurisdiction to conserve adequately the living resources off their coasts from over-exploitation by the modern factory fleets of developed countries. The LDC's were critical of existing conservation efforts by international and regional arrangements, partly because such arrangements have lacked authority and have been largely ineffective. They upheld the right of coastal States to use and manage living resources adjacent to their coasts.

The primary supporters of the principle of freedom of fishing on the high seas were the U.K., Japan, the USSR and its Eastern European Bloc, and land-locked States. They stressed that only through international and regional agreements could measures be established to (1) ensure adequate conservation measures, (2) prevent underutilization of stocks and (3) preserve rights of freedom of fishing for all countries. The U.K. was inclined to provide some flexibility for the preferential rights of coastal States, but not to the extent of damaging distant-water fishing interests. Their Delegation

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stressed the role of regional fisheries organizations and indicated the acceptability of some form of weighted voting favoring coastal States. This view was influenced to some extent by their conflict with Iceland over Iceland's intent to claim a 50-mile exclusive fisheries zone around Iceland. Japan would provide preferential fishing rights only for developing coastal States and stressed privately to us that her primary interest was in continuing to fish offshore from the U.S., Canada and the USSR, where she took approximately 60 percent of her distant-water catch. Japan, the U.K., and the USSR viewed our Article III as providing much greater coastal State control than in prior drafts and expressed concern that we are proceeding too rapidly to recognize coastal State fishing rights. They expressed doubt that we could maintain our present position, without going further in the direction of coastal State rights, until they were able to negotiate in the LOS context a satisfactory arrangement with the coastal States.

While these two extreme positions received most of the attention, some support did emerge for a more middle position. Although the U.S. draft fisheries Article was not the subject of much specific discussion, several delegations did refer to it as forming a basis of discussion. Some countries (such as Canada, Mexico and Australia), while indicating a preference for greater coastal States' rights, suggested that these rights be delegated to the coastal State as a result of international treaties. Canada suggested the term "custodian" to describe the delegated coastal State rights. A number of countries, even some which favored exclusive control, expressed a willingness to regulate highly migratory species through regional or international arrangements.

Many of the views so far expressed by African and Asian states regarding an economic zone for fisheries are apparently opening negotiating positions. This has been indicated in private discussion and public statements expressing a willingness to explore alternative approaches. Moreover, a number of LDC's are still to be heard from, especially those in Africa.

#### B. Other Significant Developments

##### (1) Marine Pollution

Little progress was made during this session on the issue of marine pollution. The U.S. stressed the work of the U.N. specialized agencies and various intergovernmental groups dealing with ocean pollution, and the desirability of internationally agreed standards on the subject. We stated that Subcommittee III should first assess the ongoing efforts of these groups and insure that items not adequately dealt with by the Stockholm and IMCO Conferences are identified and



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dealt with by the Subcommittee. The LOS Conference should draft such articles as were thought necessary to provide a broad international legal framework for dealing with marine pollution, while leaving detailed technical considerations to appropriate specialized bodies. We suggested that the Conference begin drafting at the Spring meeting Articles which would deal with marine pollution caused by seabed exploration and exploitation activities. In the course of our speech, we outlined steps being taken by the USG to combat pollution.

Spain and Australia proposed marine pollution control zones in high seas adjacent to the coast, and were supported by several other delegations. Japan and France criticized unilateral establishment of such zones. Canada took an aggressive stance on the question of pollution and expressed the view that the rights of coastal States to establish broad anti-pollution zones adjacent to the territorial sea, within the framework of a "custodianship" concept and the related delegation of powers, should be acknowledged. Japan thought that the most one could achieve at this time would be a new legal instrument for control of oil pollution. A number of other delegations favored regional arrangements, but most apparently favored basing such regional arrangements on internationally agreed principles. Norway, Spain, Mexico and Malta specifically suggested formulation of international guidelines. Spain and Mexico both pointed out their fear of possible pollution from nuclear transport.

## (2) Scientific Research

Developed countries generally supported freedom of scientific research, while many LDC's wanted it controlled by coastal State restrictions or supervised by some supranational body. The demands for such control became louder and more numerous at this session and will probably increase in the period ahead. LDC's expressed strong interest in participating in scientific research and in obtaining access to the information resulting from such research. At least some LDC's seemed to view participation in scientific research as encompassing desired technological assistance rather than being limited to joining a pure research effort. Argentina stated it intends to present a draft treaty regarding scientific research. The Latin American seabeds regime paper includes strong restrictions on scientific research.

## (3) Seabeds Proposals

Draft treaty Articles on the seabeds were formally introduced by the Soviets, Malta and a group of thirteen Latin American States at this session. A group of seven land-locked/shelf-locked States presented a working paper on specific matters to be regulated in an international seabed convention.

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The U.K. offered written proposals for elements of a convention and Canada introduced a working paper on the seabeds regime and machinery. Poland submitted a document dealing with international machinery. In general, none of the seabeds proposals introduced at this session, nor the earlier drafts by the U.S., the U.K., France and Tanzania, received systematic attention. However, each will undoubtedly be closely scrutinized when the Committee shifts from general to specific debate. This effort may be assisted by an analysis and comparison of the various proposals being prepared by the U.N. Secretariat for this Committee's use next year.

(4) Procedure

Latin American States, led by Brazil and Peru, have persisted, with some effectiveness, in their efforts to delay the substantive preparatory work of the 1973 Conference until a comprehensive list of items to be considered by the Conference is developed. They have taken a very hard-line in negotiations with respect to agreement on a list. This has resulted in no agreement thus far. In private discussions, some Latin American Representatives have freely admitted that this is part of the Latin American delaying tactics; other Latins have criticized these tactics but have nevertheless continued to observe solidarity on procedural questions.

Several draft lists were introduced: A Latin American list, an Afro-Asian list, a Norwegian list and a Bulgarian list, among others. The Latin American and Afro-Asian lists were quite comprehensive. The United States was not opposed to a list per se. But we opposed the principal lists submitted because they either failed to include appropriate items or described other items in a manner which would pre-condition consideration thereof adversely to our objectives. Efforts to reach agreement on a list were not successful because of several factors: (1) Spanish and LA insistence that the section on straits not expressly recognize that free transit through and over straits is an appropriate item for discussion; (2) Latin American, and to some extent African, insistence upon reference to a zone of economic jurisdiction beyond the territorial sea as an "exclusive" zone; and (3) a dispute between shelf-locked States and other coastal States over the question of whether shelf-locked States are entitled to special rights. Discussion of the "List" was, and could in the future be, a major impediment to substantive progress.

Up to now, delaying tactics have not prevented the introduction and some discussion of the U.S. proposals and a wide-ranging general debate in which almost all delegations have participated actively. These public statements showed

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that almost all countries had analyzed their national and international interests and sought to articulate them. It was encouraging that many Asian and African countries indicated during this session that they were interested in proceeding more promptly with the substantive work.

#### (5) Delegation Representation

Some 20 representatives of the petroleum, oil and fishing industries, interested lawyers and professors, came to Geneva for varying periods of time to observe the proceedings. The fishing industry alone had nine representatives. None of these men were on the U.S. Delegation. Many of the industry representatives, particularly from fisheries, raised the issue of accreditation on the Delegation before, during and after the July/August session. Several Congressmen are currently communicating with the Department recommending accreditation of industry representatives to the Delegation for the next session. The primary reason for not having included industry representatives on the Delegation has been the question of the classified nature of national security interests. This question is under study by the various Departments at the present time.

### III. Future Action

Future action should be directed primarily to the following areas:

First, regarding straits, we should actively seek to pick up the firm support of those non-straits' States which have no compelling reasons not to support us, while at the same time pursuing direct diplomatic contacts with the major straits' States.

Second, we should concentrate our efforts on achieving greater support for and more detailed discussions of our concept of mixed coastal and international controls over resources, particularly with States which seem attracted to the exclusive resource zone concept. At the same time, we must be careful to prevent a deterioration in the fairly broad consensus on a 12-mile territorial sea, particularly in Africa.

Third, relating to access to seabed minerals and Council representation, we should press for equal access to deep seabed minerals for all nations under terms conducive to investment and to continue to argue for acceptance of our proposal for weighted voting in the Council in favor of developed nations.

In light of the developments at the July/August meeting, we are implementing certain actions pursuant to NSDM 122, as stated below.

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A. Study of Positive and Negative Incentives

The study of positive and negative incentives, levers, and sanctions pursuant to general Option 3 of NSSM 124 has begun. Particular emphasis is being placed upon straits' States, States advocating 200-mile territorial seas or exclusive resource zones, other States that have extended their territorial sea beyond 12 miles, and certain opinion leader States.

B. Diplomatic Efforts

We intend to concentrate our diplomatic efforts on straits' States, including in particular Spain, Malaysia, the Philippines and Indonesia. We believe efforts should be made to bring our NATO allies more into line with our own thinking, particularly on straits. Emphasis will be placed on France in light of her recent decision to extend her territorial sea to 12 miles and in view of her inclination toward a 200-mile exclusive resource zone. We also plan to make demarches or other diplomatic approaches to the Caribbean States prior to their planned meeting in November. Contact with African and Asian States will be made prior to the January meeting of the Afro-Asian Legal Consultative Committee at which many Afro-Asians may begin to take definitive positions. As a result of recent extensions of coastal jurisdiction in Africa, the OAU resolution calling for extension of fisheries jurisdiction, and the large number of votes in that continent, we plan to devote particular attention to Africa and bilateral consultations with the Ivory Coast, Ghana, Nigeria and Sierra Leone are being planned.

In all consultations we shall be concentrating on policy makers who will be making decisions which will determine whether or not the Conference will be successful.

C. People's Republic of China

We also intend to initiate a study of the possible effects of participation by the People's Republic of China in these negotiations, and to develop contingency plans.

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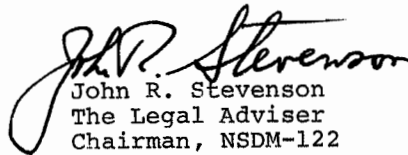
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We plan a substantive review of our positions as well. This review will be carefully coordinated with our diplomatic demarches to ensure that any reformulated positions are compatible with both efforts. With respect to straits, we will particularly wish to examine how we can respond to the concerns of straits States regarding traffic control and pollution.

We are also developing a coordinated position for handling pollution and scientific research in the context of the LOS preparatory negotiations, and this in turn will involve the further development of a coordinated USG position regarding our pollution objectives for the Stockholm Conference and in IMCO as well.

We intend to redraft our seabeds treaty in the light of international as well as domestic comments we have received. We hope in this connection to produce a shorter and simpler draft which will be more appealing to Afro-Asian countries. We have not decided whether this draft would, in fact, be introduced by us, or whether it would function as a guide for our negotiating position. We intend to invite the assistance of interested members of the public, particularly industry, in this redrafting project.

For internal purposes, we intend to develop alternate fisheries positions. In this connection, we intend to consult with members of the fishing industry and, perhaps, with foreign governments in determining the future direction we will take.

  
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Note: This memorandum has been cleared with other interested agencies as appropriate.

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